CITATION: Constantinidis v. Lumar Design Group Inc., 2025 ONSC 1109
COURT FILE NO.: CV-23-705462
DATE: 2025 02 19

SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE MATTER OF the *Construction Act*, RSO 1990, c C.30, as amended

RE: KYRIAKOS CONSTANTINIDIS o/a FIELDING CONSTRUCTION, *Plaintiff*

- and -

LUMAR DESIGN GROUP INC., NICK KOUTLEMANIS, BILL AGGELIS, and ROYAL BANK OF CANADA, *Defendants*

BEFORE: Associate Justice Todd Robinson

COUNSEL: J. Barr, *for the defendants, Lumar Design Group Inc. and Nick Koutlemanis, and as agent for the defendant, Bill Aggelis (moving parties)*

R. Kalanda, *for the plaintiff*

PARTIES: B. Aggelis, *in person (observing)*

HEARD: October 23, 2024 (by videoconference)

REASONS FOR DECISION
(Motion to Discharge Lien)

[1] The defendants collectively move to discharge the plaintiff's lien and dismiss this action as being frivolous, vexatious, and an abuse of process or, alternatively, for inexcusable and inordinate delay in advancing this action. They assert that the plaintiff is not a proper lien claimant, that the lien is a pressure tactic, and that they continue to suffer undue prejudice from the improper lien and ongoing delays in prosecuting the action.

[2] The dispute arises from renovation work performed at a house on Coxwell Avenue in Toronto, which is owned by Bill Aggelis. Mr. Aggelis formally entered into a contract with Lumar Design Group Inc. ("Lumar") for the renovation work. Nick Koutlemanis is the principal of Lumar. It is undisputed that work was performed by Kyriakos Constantinidis who operates a business called Fielding Construction. The core dispute is over the relationship between Mr. Koutlemanis and Mr. Constantinidis, specifically whether they were in partnership on the project or whether Mr. Constantinidis was a subcontractor to Lumar.

[3] Kyriakos Constantinidis registered his claim for lien against the property in June 2023. He was cross-examined on the lien in August 2023, following which this lien action was commenced

in September 2023. Other than exchanging pleadings, nothing has happened in the lien action. Some undertakings from the cross-examination still remain outstanding.

[4] Lien actions are statutorily prescribed to be summary in nature. Mr. Constantinidis has not advanced this litigation in a timely fashion. Nevertheless, I am not convinced that the delay is so sufficient to warrant discharging the lien and dismissing this action. On the substantive issues of whether there was a partnership and, as a result, whether Mr. Constantinidis is a proper lien claimant and proper quantification of the lien, there is merit to the defendants' positions. However, I find triable issues both on the relationship and agreement as between Mr. Constantinidis and Mr. Koutlemanis with respect to the project and with proving the lien claim. I am accordingly dismissing the motion, but am imposing a timetable for next steps.

ANALYSIS

[5] The defendants move for relief under both s. 47 of *Construction Act,* RSO 1990, c C.30 and subrule 24.01(1)(c) of the *Rules of Civil Procedure,* RRO 1990, Reg 194 (the "*Rules*").

[6] Discharge of a lien may be ordered under the *Construction Act* on the basis that the claim for the lien is frivolous, vexatious or an abuse of process, or on any other proper ground: s. 47(1). Registration of a claim for lien or certificate or action may also be ordered vacated or an action dismissed on any proper ground: s. 47(1.1). An order made under s. 47 may include any terms or conditions that the court considers appropriate in the circumstances: s. 47(1.2).

[7] Subrule 24.01(1)(c) of the *Rules* provides that a defendant who is not in default under the *Rules* or an order of the court may move to have an action dismissed for delay where the plaintiff has failed to set the action down for trial within six months after the close of pleadings.

[8] No case law has been cited granting relief in a lien action under rule 24 of the *Rules*. I have previously held that subrule 24.01(1)(c) is inconsistent with the scheme of the *Construction Act* and does not apply in lien actions: *Bernach v. Makepeace,* 2021 ONSC 1289 at para. 17; *Smith v. Hudson's Bay Company,* 2019 ONSC 2348 at para. 19. I remain of the same view. Relief in this lien action is accordingly not available to the defendants under subrule 24.01(1)(c). I have thereby only considered the arguments for discharge of the lien and dismissal of the action under s. 47 of the *Construction Act*.

[9] The defendants argue that the lien and this action are frivolous, vexatious, and an abuse of process. They submit that Kyriakos Constantinidis is not a proper lien claimant. He and Lumar are alleged to be partners and co-contractors on the project. Since there was no default under the contract with Bill Aggelis, and no amounts are owing, the defendants argue that there is no basis for a lien claim by Mr. Constantinidis. The defendants further argue that Mr. Constantinidis has failed, or is unable, to quantify his lien claim, which supports that the lien is frivolous, vexatious, or an abuse of process. In addition, they argue that they are suffering undue prejudice from the ongoing lien, which they submit is itself a "proper ground" on which to discharge it.

[10] Discharging a lien under s. 47 of the *Construction Act* in these circumstances is substantive relief and a discretionary decision. The Divisional Court has set out that, in deciding a s. 47

motion, the focus is on whether there is a triable issue in respect to any of the bases on which a moving party seeks discharge and dismissal: *Maplequest (Vaughan) Developments. Inc. v. 2603774 Ontario Inc.*, 2020 ONSC 4308 (Div Ct) at para. 2. I have previously commented that s. 47 is broadly drafted and may be used in a variety of manners. Those include a process similar to summary judgment under rule 20 of the *Rules* as well as in other manners that do not necessarily seek a summary disposition of a lien action on its merits: *Infinite Construction Development Ltd. v. Chen*, 2022 ONSC 3929 at para. 16, aff'd 2023 ONSC 2627 (Div Ct); *GTA Restoration Group Inc. v. Baillie*, 2020 ONSC 5190 at paras. 42-45, leave to appeal ref'd 2021 ONSC 1250 (Div Ct).

[11] When discharge is sought on the merits, both parties have a "best foot forward" evidentiary onus. Nevertheless, the primary evidentiary onus remains on the moving party to establish that there is no triable issue on each basis for discharge: *GTA Restoration Group Inc v Baillie*, 2020 ONSC 5190, at paras. 52 and 56.

[12] The parties' dispute turns, in part, on whether Mr. Constantinidis is a "contractor" or a "subcontractor" under the *Construction Act*. The relevant definitions of those terms are set out in s. 1(1) of the *Construction Act*, as follows:

> "contractor" means a person contracting with or employed directly by the owner or an agent of the owner to supply services or materials to an improvement and includes a joint venture entered into for the purposes of an improvement or improvements;
>
> "subcontractor" means a person not contracting with or employed directly by the owner or an agent of the owner but who supplies services or materials to the improvement under an agreement with the contractor or under the contractor with another subcontractor and includes a joint venture entered into for the purposes of an improvement or improvements;

[13] A lien arises under s. 14 of the *Construction Act* for the "price" of services and materials supplied to an improvement. Under s. 1(1), "price" is defined with reference to the contract or subcontract. Based on the record before me, there is only one contract with Bill Aggelis, namely the contract with Lumar. The record further supports that, at the time that Kyriakos Constantinidis preserved and perfected his lien, Bill Aggelis was not in default under the contract with Lumar and that no amounts were due and owing to Lumar. It follows that if Mr. Constantinidis is a co-contractor, as alleged, and not a subcontractor, then there is arguably no valid basis for a lien for unpaid amounts.

[14] Nick Koutlemanis' evidence is that Kyriakos Constantinidis agreed to partner with Lumar on the project and to share in any resulting profits once the job was complete. They worked together to develop the scope of work and pricing for the job, as well as deciding timing and amount of progress payment requests from Bill Aggelis. Mr. Aggelis' evidence is that he contracted with Lumar, but understood that Nick Koutlemanis was undertaking the project in partnership with Mr. Constantinidis. Mr. Aggelis' evidence is that he was told by Mr. Koutlemanis that the two were partners.

[15] Kyriakos Constantinidis' evidence is that he was not in any partnership with Nick Koutlemanis or Lumar. His evidence from the s. 40 cross-examination confirms that he assisted

in pricing and was "partnering up" with Mr. Koutlemanis. However, Mr. Constantinidis' affidavit states that he had only an informal, oral arrangement with Mr. Koutlemanis to perform work and be compensated at a daily rate of $400, plus reimbursement of all expenses, followed by a split of any net profits 50/50 with Lumar. Mr. Constantinidis says that he understood he was being hired by Lumar, not Mr. Aggelis.

[16] There is no dispute that Mr. Constantinidis supplied services and materials to the property. Mr. Constantinidis claims to be owed money by Nick Koutlemanis and/or Lumar, not Bill Aggelis. That was admitted during his s. 40 cross-examination. On the partnership dispute, though, I find triable issues both on whether there was, in fact, a partnership as alleged and on whether Mr. Constantinidis is a "subcontractor" under the *Construction Act*. I say this for several reasons.

[17] First, although the agreed compensation alleged by Mr. Constantinidis for his work includes profit sharing, which is more typical of a partnership arrangement, and Mr. Constantinidis admittedly did not render any invoices on Lumar, those facts are not dispositive. On the record before me, there are several arguable indicia of a partnership. The affidavit evidence and s. 40 cross-examination evidence on the relationship between Mr. Constantinidis and Nick Koutlemanis could well support a finding of partnership at trial, but it also equally supports a finding that Mr. Constantinidis was an active, supportive subcontractor. For example, it is not uncommon for subcontractors to support contractors by providing cost estimates before a prime contract is finalized, or even to assist in defining scope of work and job costing. In my view, deciding the disputed partnership requires additional evidence on their relationship during the course of the project that is not before me.

[18] Second, there is no written agreement between Mr. Constantinidis and Mr. Koutlemanis, who disagree on the nature and scope of their oral agreement. In my view, credibility is squarely at issue. Mr. Aggelis' evidence on his understanding that the two were partners does not assist, since it seems to come from representations to that effect by Mr. Koutlemanis. The credibility dispute is better resolved on a more fulsome evidentiary record than is available to me on this motion. The record before me is limited to largely self-serving affidavits on which no cross-examination occurred.

[19] Third, regardless of whether a partnership agreement is found, the record before me does not support a finding of any direct contract between the owner, Bill Aggelis, and Mr. Constantinidis. Lumar is not, nor is it alleged to be, an "agent of the owner" under the *Construction Act*. Lumar is also not argued to have been an agent for Mr. Constantinidis when entering the contract with Bill Aggelis. In any event, there is insufficient evidence before me to find that Nick Koutlemanis acted as Mr. Constantinidis' agent. I am accordingly unable to find that Mr. Constantinidis was clearly "employed directly by the owner or an agent of the owner". Whether Mr. Constantinidis is a "contractor", as alleged by the defendants, is thereby a triable issue.

[20] If Mr. Constantinidis was not a "contractor", then any services and materials supplied by him were supplied pursuant to some agreement with Nick Koutlemanis or Lumar. In my view, there is also a triable issue on whether Mr. Constantinidis' supply of services and materials meets the definition of "subcontractor", regardless of whether there was a partnership agreement, since

Mr. Constantinidis' supply of services and materials under a partnership agreement may still have been a supply "under an agreement with the contractor". No case law was tendered by either side dealing with judicial interpretation of that portion of the definition.

[21] I am also not satisfied that Mr. Constantinidis' failure to more clearly quantify his lien rises the the level of a frivolous, vexatious, or abusive lien such that it should be discharged, at least not yet. The defendants point to and rely on my colleague's decision in *2708320 Ontario Ltd. cob Viceroy Homes v. Jia Development Inc.*, 2023 ONSC 2301. In that case, my colleague held that the lien claimant's lien was frivolous, vexatious, and an abuse of process and discharged it. The defendants have sought to draw parallels between this case and that decision, but I do not agree that they are comparable.

[22] *Viceroy Homes* turned on its facts. It involved a claim for over $3 million in alleged services and materials supplied in a period of only 39 days. My colleague did not accept that the claimed work was performed based on the evidentiary record before him. That included contemporaneous records, such as photographs, and admissions during the lien claimant's s. 40 cross-examination that claimed work had not been performed, that the amount of the claim for lien was based on budgeting estimates, and that the lien included amounts for materials that had not been supplied to the site. The lien claimant also failed to respond to or appear on the motion.

[23] In this case, cross-examination on the lien took place on August 22, 2023. During that examination, Mr. Constantinidis does appear to have relied on his memory and his own estimates of work completed and time spent in reaching the lien quantum. He has provided some disclosure of his receipts and records, but did not provide any clear accounting of the lien until this motion was brought. The defendants have raised meritorious challenges to many of the items in that hand-written accounting. However, the fact that Mr. Constantinidis has failed to tender an ironclad accounting of his lien and the payments received in response to this motion does not mean that his claim is "void of merit and obviously cannot succeed."

[24] For example, the disputed hours claimed by Mr. Constantinidis as worked do not necessarily need be proved by documents, such as timesheets, but may also be proved by testimonial evidence of workers. Similarly, Mr. Constantinidis has put forward an interesting argument on how, since compensation for work performed was to include a profit component, an amount for estimated profit is properly accounted for when valuing the work already performed. That argument may or may not ultimately succeed, but I need not decide it. In my view, there is sufficient other evidence before me supporting triable issues on quantification of the lien.

[25] The defendants further argue that undue prejudice is itself a "proper ground" on which to discharge Mr. Constantinidis' lien. In support of that position, they point to litigation delay and the financial strain on both Nick Koutlemanis and Bill Aggelis, as set out in their affidavits. Mr. Koutlemanis has provided an affidavit outlining alleged reputational damage and financial impacts from Mr. Constantinidis' purported abandonment of the project. Mr. Aggelis has also provided an affidavit outlining financial impacts from the lien, including the inability to re-finance and other financial hardship. He also outlines the untenable living arrangements that Mr. Aggelis and his family have had to continue while the project remains stalled, namely continuing to impose

on his elderly parents in their three-bedroom semi-detached house, which is not large enough for Mr. Aggelis, his spouse, his children, and his parents.

[26] I have sympathy for the situations of both Mr. Koutlemanis and Mr. Aggelis. In my view, though, in the circumstances of this case, the prejudice allegedly suffered by them due to the lien is more properly the subject matter of a claim for damages under s. 35 or for costs under s. 86 if the lien is not proven, not discharge of the lien.

[27] Lien actions are statutorily-mandated to be summary in nature: *Construction Act*, s. 50(3). There has been some delay in this lien action, but it has not been inordinate. This motion was brought over a year after the action was commenced, at which time only partial answers had been provided from the s. 40 cross-examination. However, there is evidence before me supporting that, in late 2023, there were ongoing settlement discussions. Mr. Constantinidis appears to have failed to respond to multiple requests for his answers to undertakings between January and April 2024, but his lawyer did provide some disclosure in May 2024 and communicated with opposing counsel. Although it appears a removal motion was anticipated, the plaintiff's lawyers remained on the record. The parties had discussed exchanging affidavit of documents and conducting examinations for discovery, but both are interlocutory steps in a lien action requiring consent of the court: O Reg 302/18, s. 13. There has been no formal order granting leave for discoveries and, based on the email exchanges in evidence, the terms of discovery were not fully agreed.

[28] I am mindful that the *Construction Act* affords a lien claimant with two years from the date of commencing a lien action to have it set down for trial: *Construction Act*, s. 37(1). Particularly since I have found triable issues on the merits of Mr. Constantinidis' lien and claim, I am unconvinced that his delay in this action, which is not yet close to its second anniversary, is itself sufficient to constitute a "proper ground" to discharge the lien. There remains ample time the parties to ready this action for trial in compliance with s. 37(1).

[29] In my view, though, the inaction by Mr. Constantinidis and the evidence before me on the ongoing impacts of the lien do warrant judicial intervention to move the action forward to trial readiness. In the alternative to the discharge and dismissal relief, the defendants have proposed a timetable for next steps. Mr. Constantinidis does not oppose that timetable being imposed. Given this reserve, though, dates have passed and it accordingly requires modification.

DISPOSITION

[30] For the foregoing reasons, I order as follows:

(a) The plaintiff shall provide answers to all outstanding undertakings and a position on the matter taken under advisement from the s. 40 cross-examination held on by February 28, 2025.

(b) Leave is hereby granted *nunc pro tunc* for documentary discovery and examinations for discovery.

(c) The plaintiff shall serve his affidavit of documents and Schedule A productions by February 28, 2025.

(d) The parties shall complete examination for discovery by March 28, 2025, unless otherwise mutually agreed by the parties, in accordance with the following:

(i) The plaintiff's s. 40 cross-examination shall stand as examination for discovery of the plaintiff, without prejudice to the defendants examining on relevant pleaded issues not examined upon and/or beyond the scope of the s. 40 cross-examination.

(ii) Examinations shall be by oral examination with a maximum of three (3) hours of examination per party or commonly represented party, subject to the parties' agreement to vary or extend that time.

(iii) Absent exceptional circumstances, any question asked during examinations that is objected to solely on the basis of relevance shall be answered under subrule 34.12(2) of the *Rules*. As provided in that subrule, evidence from such an answer shall not be used at any hearing, including trial, without leave. Failure to comply with this order or abuse of it will be considered in determining costs of any discovery-related motion or at trial.

(e) Answers to undertakings and positions on advisements, if any, shall be given within forty-five (45) days from the date of the examination.

(f) If motions on refusals and undertakings are anticipated, then the parties shall exchange the charts required by subrule 37.10(10) of the *Rules* **prior to** booking and serving any motion materials, which shall be exchanged on a timetable agreed by the parties acting reasonably.

(g) The defendants' motion is otherwise dismissed.

(h) This order is effective without further formality.

COSTS

[31] Costs outlines were exchanged. Mr. Constantinidis confirmed that he was not seeking costs in the event he was successful. However, this motion appears to have been needed to prompt the plaintiff to engage with this litigation. In these circumstances, I am not prepared to deny the defendants their costs of the motion.

[32] I have broad discretion under s. 86 of the *Construction Act* in deciding costs of a motion, including against whom costs should be ordered. As set out in subrule 57.01(2) of the *Rules*, the fact that a party is successful in a step in a proceeding does not prevent the court from awarding costs against the party in a proper case. If the defendants seek any costs at this time, and the parties cannot agree, then the defendants are at liberty to arrange a case conference before me for the purpose of making costs submissions.

[33] Any hearing for costs submissions shall be booked directly through my Assistant Trial Coordinator within thirty (30) days of this decision being released (although the hearing date need not be within that timeframe). If costs are not agreed and no such hearing is booked, then the

defendants' costs of this motion shall be reserved to final disposition of the action and claimable in the cause.

ASSOCIATE JUSTICE TODD ROBINSON

DATE: February 19, 2025